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THE UTILITY OF DISCLOSURE AS A REFORM TO THE PRETRIAL DISCOVERY PROCESS

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The Civil Justice Reform Act of 1990 ("CJRA") requires each United States District Court to implement a civil justice expense and delay reduction plan ("plan").¹ Plans are to be developed by a court-appointed advisory group consisting of attorneys and lay persons representing litigants within the district.² While the CJRA does not specify the exact content of the individual plans, it sets forth guidelines to be considered when formulating them.³

One of the major targets of the CJRA's guidelines is the discovery process.⁴ Specifically, the CJRA suggests changing the pretrial process by controlling the extent of discovery and time allowed to complete it. In order to contain discovery costs, the CJRA encourages the "voluntary exchange of information . . . through the use of cooperative discovery devices."⁵

This Article focuses on the concept of automatic disclosure of information without the making of a formal request as one suggested method of containing the expense and delay of the discovery process. After reviewing statistical information indicating the length of the typical discovery process as well as attorneys' and judicial officers' attitudes towards the discovery process, the Article describes the "disclosure" process⁶ and discusses certain disclo-

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¹ Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (Supp. 1992).

² *Id.* § 478. The chief judge of each district court designates a reporter for each group. *Id.*

³ *Id.* § 473. The advisory group shall consider and may include in the plan the differential treatment of civil cases, early and continuous control of the pretrial process by a judicial officer, encouragement of cost-effective discovery, and authorization to use alternate dispute resolution programs. *Id.*

⁴ *Id.* § 473(a)(4).

⁵ *Id.*

⁶ The term "disclosure" is used to describe the voluntary exchange of information without the making of a discovery request pursuant to Rule 26(a) of the Federal Rules of Civil Procedure. FED. R. CIV. P. 26(a). Rule 26 discovery methods include: deposi-

sure procedures currently in effect, as well as amendments to the Federal Rules of Civil Procedure ("Federal Rules"). Finally, this Article addresses the efficacy of the automatic disclosure procedure and concludes that, while the proposed system may be valuable in reducing the disposition time of simple cases, disclosure fails to treat the perceived greater abuses of the discovery process.

I. STATISTICAL INFORMATION

It is difficult to pinpoint the amount of time necessary to complete the discovery process in the typical civil case. One way to attempt to capture this information is to compare statistics indicating the average time to dispose of a case involving no pretrial activity with statistics indicating the average time to dispose of a case in which some or all pretrial activity has occurred. Presumably, the time difference between these two categories of cases indicates the amount of time the parties engage in pretrial discovery.

The Administrative Office of the United States Courts publishes statistics indicating the amount of time it takes for each district court to dispose of its cases. By comparing cases in the two categories described above, the Administrative Office determined that the national average time in which parties were engaged in pretrial discovery during the twelve month period ending June 30, 1990 was seven months.⁷ The average time in federal district courts in the State of New York compared favorably with the national average. In the same year, parties litigating in the Eastern District of New York spent an average of nine months engaged in the pretrial discovery process, while in the Southern

tions written interrogatories; and requests for production of documents or things permission to enter upon land or property for investigative purposes, physical, and mental examinations and for admissions. *See id.*; *see also infra* notes 22-24, 30-51 and accompanying text (discussing various forms of disclosure).

⁷ *See* 1992 DIR. OF THE ADMIN. OFFICE OF THE U.S. CTS. ANN. REP. app. 1, tbl. C-5 [hereinafter ANN. REP.] (indicating average time from filing to disposition of cases filed in district courts). According to this report, the average time to dispose of a case in which the parties conducted all or "some" pretrial activity was fourteen months. *Id.* The average time period between filing and disposition of a case in which there had been no pretrial activity was seven months. *Id.* The difference between these two periods of time reflects an average pretrial discovery period of seven months. *Id.* These statistics include cases involving all areas of federal jurisdiction. *Id.* The report does not distinguish cases in which some, as opposed to all, of the pretrial discovery process has been completed.

District of New York, the average time to complete discovery was twelve months.⁸

When numbers alone are considered, the pretrial discovery process does not seem fraught with delay and thus, one might assume that there is little dissatisfaction among attorneys and litigants. Although the numbers fail to communicate dissatisfaction with the discovery process, surveys of attorneys and judicial officers paint a different picture.⁹

In a 1989 survey conducted by Louis Harris and Associates, Inc. (the "Harris Survey"), 900 attorneys and 147 federal district court judges were polled to determine perceptions of the high costs and unnecessary delays attendant to federal civil litigation.¹⁰ Respondents were also asked to comment as to particular procedural reforms.

The Harris Survey indicates that attorneys and judges overwhelmingly identify discovery abuse as the single most important cause of high costs and delay in federal civil litigation. Sixty-two percent of private litigators, including both plaintiff and defense bars, identified abuse of the discovery process as a "major cause" of excessive costs and delays.¹¹ Seventy-one percent of federal judges agreed.¹² The highest degree of consensus came from the corporate counsel interviewed, eighty percent of whom agreed that discovery abuse is a "major cause" of expense and delay.¹³ This high percentage is not surprising given the fact that corporate counsel are closest to the individual most affected by discovery abuses—the client.

When asked to identify the aspects of the discovery process that are responsible for the perceived abuse, respondents most often pointed to attorneys who "over-discover" cases by failing to focus on issues involved.¹⁴ Respondents also blamed attorneys who request information that is immaterial to the subject matter

⁸ See *id.*

⁹ See *infra* notes 10-17 and accompanying text (discussing survey which illustrates high level of dissatisfaction with discovery process).

¹⁰ LOUIS HARRIS & ASSOCS., INC., PROCEDURAL REFORM OF THE CIVIL JUSTICE SYSTEM, Mar. 1989 [hereinafter HARRIS SURVEY].

¹¹ *Id.* at 20.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 23.

of the case.¹⁵ Smaller percentages of respondents blamed attorneys who refused to produce discoverable information.¹⁶

The results of the Harris Survey indicate that dissatisfaction with the discovery process is as widespread today as in 1983 when reforms to the discovery rules were enacted in an effort to curb abuses associated with unnecessary expense and delay.¹⁷ Thus, it appears that prior reforms to the Federal Rules, including the introduction of a balancing concept between relevance and burden into the definition of what is "discoverable" and the imposition of sanctions for discovery abuses, have had little effect in curbing the undue expense and delay associated with the discovery process.¹⁸

Faced with the continuing failure of the current discovery system to lead to "the just, speedy, and inexpensive determination of every action,"¹⁹ courts have begun experimenting with disclosure as a new tool to reform the discovery process.

II. DISCLOSURE DEFINED

Simply stated, the term disclosure is used to refer to the voluntary exchange of documentary evidence without the necessity of making a formal request. In its broadest sense, the process of disclosure would completely supplant the discovery process in its present form.²⁰ As proposed by Judge Schwarzer, this is achieved

¹⁵ HARRIS SURVEY, *supra* note 10, at 23-24.

¹⁶ *Id.* at 24. Between 59% and 86% of respondents blamed "over-discovery" as a "major cause" of undue expense and delay associated with the discovery process. Percentages of those identifying the withholding of discoverable information as a "major cause" of undue expense and delay ranged between 21% and 48%. Interestingly, 59% of respondents practicing in small plaintiffs' firms perceived the withholding of discoverable information as a major cause of expense and delay, while only 30% of respondents practicing in large defense firms pointed to this factor. *Id.* This can probably be explained by the fact that, in most cases, it is the large defense firm that represents the entity in possession of the greatest volume of documents. *Id.*

¹⁷ See FED. R. CIV. P. 11, 16, 26(b)(1)(g); see also Peter M. Fishbein, *New Federal Rule 26: A Litigator's Perspective*, 57 ST. JOHN'S L. REV. 739, 739 (1983). For example, Rule 26 was amended to deal with the broadness of the discovery rules that had led to situations in which even legitimate discovery requests had become wasteful and expensive. *Id.* The revised rule called for a cost analysis and permitted the court to limit or prohibit discovery under appropriate circumstances. *Id.* at 743.

¹⁸ See *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives and Accommodation: Steering Committee Report*, 1989 DUKE L.J. 811, 818 (1989) (noting that while pretrial discovery has been extensively studied and related rules amended several times, abuse and discontent remain high).

¹⁹ See FED. R. CIV. P. 1.

²⁰ William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721 (1989).

by shifting the focus of the rules from "discovery—the process—to disclosure—the objective."²¹ This concept is referred to herein as "general disclosure." Disclosure is also used to refer to the early exchange of information prior to embarking on the traditional discovery process. This concept is referred to herein as "limited disclosure."

A. General Disclosure

The concept of "general disclosure" envisions a rule requiring early and continual disclosure of documents and information by all parties.²² The materials to be disclosed include documents in existence, such as those currently produced in response to document requests, as well as written responses yet to be created, similar to those currently provided in response to interrogatories.

The information to be voluntarily produced is defined as all documents and information "material to any claim or defense in the action, together with the names and addresses of all persons reasonably believed to have information material to the action."²³ Judge Schwarzer also recommended that litigants submit "statements informing the opposing party of the material information possessed by persons under its control, such as the individual parties and their managing agents."²⁴ The duty to disclose would be ongoing and failure to disclose could result in the imposition of sanctions.

Under Judge Schwarzer's model, conflicts among the parties as to the proper scope of disclosure are to be resolved judicially by

²¹ *Id.*

²² *See id.* at 722-23.

²³ *Id.* at 721. The term "material" includes information that "may have a bearing on the outcome of the action." William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?* 74 JUDICATURE 181 (1991). Material information also includes information "that would be helpful to the opponent." *Id.* It does not include however, matter that is to be used solely for impeachment purposes. *Id.* These materiality standards are meant to be more stringent than the current "reasonably calculated to lead to the discovery of admissible evidence" standard. *See* FED. R. Crv. P. 26(b)(1). The limited scope of materiality is tied to the notion that parties may not use the disclosure process to develop their claims; instead, parties have a duty to investigate prior to commencing an action. *See* Schwarzer, *supra*, at 181.

²⁴ Schwarzer, *supra* note 23, at 180. At the time of filing the complaint, the plaintiff would be required to disclose and the defendant would be required to answer or move on the merits. *Id.*

making a "motion to clarify."²⁵ For example, if a defendant in a drug products liability action believes that only a certain formulation or strength of the drug is relevant, that party would argue for production of information regarding only the formula or dose at issue. The plaintiff, on the other hand, might contend that all formulations are potentially relevant. In such a case, counsel might file a motion to clarify the extent of defendant's disclosure obligations.

Judge Schwarzer's proposed system of general disclosure allows the parties to resort to traditional discovery methods only upon court order granted after making a motion that clearly demonstrates the need for additional information.²⁶ According to Judge Schwarzer, such a motion might be granted when documents known to be in existence have not been produced or when a conflict arises that requires explanation.²⁷ Leave to take traditional discovery would also be granted in complex cases which require depositions to explain proposed testimony or depositions of expert witnesses.²⁸

B. *Limited Disclosure*

The concept of limited disclosure contemplates the imposition upon all parties of a duty to disclose information prior to embarking upon traditional discovery methods. Such limited disclosure provisions are already in effect in certain federal district courts,²⁹ and advisory groups appointed pursuant to the CJRA have been encouraged to incorporate such provisions into their expense and delay reduction plans.³⁰ The recently approved amendments to

²⁵ Schwarzer, *supra* note 23, at 181. The judge would then decide the motion on a case-by-case basis, rather than on theoretical principles as is the current practice. *Id.*

²⁶ See Schwarzer, *supra* note 23, at 181 ("No discovery would be permitted against an adverse party until after full disclosure has been made, and then only by order of the court on a showing of a particularized need.").

²⁷ Schwarzer, *supra* note 23, at 181-82.

²⁸ Schwarzer, *supra* note 23, at 182.

²⁹ See, e.g., *infra* note 32 and accompanying text.

³⁰ See *infra* notes 36-39 and accompanying text.

the Federal Rules³¹ similarly embrace this concept of disclosure prior to discovery.³²

Local court rules in the Southern District of Florida and the Central District of California require counsel to schedule an "early meeting" for the purpose of, *inter alia*, exchanging certain enumerated documents and lists of witnesses.³³ Specifically, counsel are to exchange all documents "reasonably available to a party which are then contemplated to be used in support of the allegations of the pleading filed by the party."³⁴ Parties are also required to exchange "any other evidence then reasonably available . . . to obviate the filing of unnecessary discovery motions."³⁵

The Litigation Section of the American Bar Association (the "ABA") recommended that advisory groups appointed pursuant to the CJRA incorporate a form of automatic disclosure into their plans. Although the ABA rejected the adoption of a system of general disclosure, it recommended that parties automatically produce a list of names of persons whom they intend to call at trial, along with a brief summary of their testimony.³⁶ Further, the ABA suggested that parties provide a list of exhibits the party intends to introduce at trial, including those used to support claims for damages.³⁷ Under the ABA model, defendants would be re-

³¹ See Randall Samborn, *New Discovery Rules Take Effect*, NAT'L L.J., Dec. 6, 1993, at 3 (reporting passing of expiration date for Congressional nullification of Federal Rules drafted by Supreme Court). See generally 28 U.S.C. §§ 2072-2074 (1988 & Supp. 1992) (authorizing Supreme Court to prescribe rules of civil procedure, which become effective unless Congress acts otherwise).

³² See FED. R. CIV. P. 26 advisory committee note, reprinted in 113 S. Ct. orders 609, 701-02 ("Through the addition of [Rule 26(a),] paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement."). The rule is proposed to "accelerate the exchange of basic information . . . and eliminate the paperwork involved in requesting such information." *Id.*

³³ See C.D. CAL. R. 6.1; S.D. FLA. R. 16.1(B).

³⁴ S.D. FLA. R. 16.1(A)(1). The same language appears in the court rules for the Central District of California. See C.D. CAL. R. 6.1.1.

³⁵ See C.D. CAL. R. 6.1.3; S.D. FLA. R. 16.1(B)(3). Furthermore, parties must exchange lists of those witnesses with knowledge of facts that support material allegations and remain bound by a continuing duty to make known new witnesses involved in the litigation. See C.D. CAL. R. 6.1.4; S.D. FLA. R. 16.1(B)(4).

³⁶ MODEL LOCAL RULES FOR UNITED STATES DISTRICT COURTS TO IMPLEMENT THE CIVIL JUSTICE REFORM ACT OF 1990 Part II (VII)(a)(4), (b)(4) (A.B.A. Litig. Sect. 1991) [hereinafter ABA Rules].

³⁷ See *id.* at Part II (VII)(a)(5), (b)(5). Individual judges often require witness and exhibit lists, such as those suggested to be mandatorily provided, to be produced as part of the parties' pretrial discovery order. *Id.*

quired to produce a statement of whether plaintiff's claims would be covered by insurance and if so, the amount and nature of the insurance.³⁸ As noted, the ABA specifically rejected the notion that disclosure replace discovery. Rather, like the local court rules referred to above, the ABA envisions disclosure as merely a first step in the discovery process.³⁹

The amendments to the Federal Rules impose a duty to disclose similar to that of the court rules in effect in the Southern District of Florida and the Central District of California.⁴⁰ Rule 26⁴¹ requires each party to provide to every other party "the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information."⁴² Individuals possessing discoverable information have been defined as those who would likely be deposed or called as a witness by any party, but do not include each and every individual with any information whatsoever about the litigation.⁴³ Identification of the subjects of witnesses' information envisions the exchange of a brief outline of the topics about which each individual will testify.⁴⁴

Rule 26 also requires parties to provide copies, or a description, of all documents and "tangible things" in the possession of the party "that are relevant to disputed facts alleged with particularity in the pleadings."⁴⁵ The language "relevant to disputed facts alleged with particularity in the pleadings" replaced the

³⁸ *Id.* at Part II (VII)(b)(8).

³⁹ *See id.* at Part II (VII) note ("We do *not* believe that 'disclosure' is the answer to discovery delay and abuse because it adds a further layer of complexity and uncertainty to the subject.").

⁴⁰ *See supra* notes 33-35 and accompanying text (discussing local court rules).

⁴¹ FED. R. CIV. P. 26 (effective Dec. 1, 1993).

⁴² FED. R. CIV. P. 26(a)(1)(A) (effective Dec. 1, 1993). The amended Rules also require disclosure of expert witness testimony and pretrial disclosure of witnesses and exhibits. *See* FED. R. CIV. P. 26(a)(2), (3) (effective Dec. 1, 1993). The timing of disclosure of this information is tied into the date of trial rather than to the early stages of the litigation. *See id.*

⁴³ *See* Proposed Rule 26(a)(1)(A) 1991 advisory committee note, *reprinted in* 112 S. Ct. orders 280, 306.

⁴⁴ *See* FED. R. CIV. P. 26(a) advisory committee notes, *reprinted in* 113 S. Ct. orders 609, 704.

⁴⁵ FED. R. CIV. P. 26(a)(1)(B) (effective Dec. 1, 1993); *see* FED. R. CIV. P. 26, advisory committee note, *reprinted in* 113 S. Ct. orders 609, 704; ("Subparagraph (B) is included as a substitute for the inquiries routinely made about the existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party.").

phrase "bears significantly on any claim or defense," which was contained in an earlier version of the proposed rules.⁴⁶ While arguably neither phrase would dissuade a crafty litigator from abusing the disclosure process, as routinely occurs, the advisory committee admonishes litigators to forego "indulg[ing] in gamesmanship with respect to the disclosure obligations."⁴⁷ The committee contemplates that the issues which would be the subject of disclosure would be "informally refined and clarified" in keeping with "common sense . . . [and] the salutary purposes [of] the rule."⁴⁸ The amended Rules also require the parties to provide a computation of any damages claimed⁴⁹ and to produce or make available for inspection and copying all documents upon which that computation is based.⁵⁰ Finally, parties must produce or make available any insurance agreement under which an insurer may be liable to satisfy all or part of any judgment that may be rendered in the case.⁵¹

Rule 26 further requires that the enumerated disclosures be made early in the litigation⁵² and prohibits a party from avoiding disclosure on the grounds that it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosure.

Like the local rules referred to above, the amended Rules allow the parties access to traditional discovery methods without the necessity of a court order. Such discovery is not unlimited, however, in that the amended Rules restrict the number of deposi-

⁴⁶ Compare FED. R. CIV. P. 26(a)(1)(B) (effective Dec. 1, 1993) with Proposed Rule 26(a)(1)(B), reprinted in 112 S. Ct. orders 280, 294.

⁴⁷ FED. R. CIV. P. 26 advisory committee notes, reprinted in 113 S. Ct. orders 609, 705.

⁴⁸ *Id.*

⁴⁹ FED. R. CIV. P. 26(a)(1)(C) (effective Dec. 1, 1993).

⁵⁰ *Id.*

⁵¹ FED. R. CIV. P. 26(a)(1)(D) (effective Dec. 1, 1993) (replacing Rule 26(b)(2); providing for discoverability of insurance agreements). The prior rule specifically stated that such production does not render the insurance agreements admissible at trial. See FED. R. CIV. P. 26(b)(2) (superseded Dec. 1, 1993). The omission of this specific language does not change the rule on admissibility. See FED. R. CIV. P. 26(a)(1)(D) advisory committee notes, reprinted in 113 S. Ct. orders 609, 706.

⁵² See FED. R. CIV. P. 26(a)(1), (f) (effective Dec. 1, 1993). The amended rules mandate that the parties meet "as soon as practicable and in any event at least 14 days before a [Rule 16] scheduling conference" to discuss, inter alia, the requisite Rule 26 disclosures. FED. R. CIV. P. 26(f) (effective Dec. 1, 1993). Disclosure should be made at this meeting or within 10 days thereafter. FED. R. CIV. P. 26(a)(1) (effective Dec. 1, 1993).

tions and interrogatories that may be used.⁵³ Specifically, Rule 33(a) limits the number of interrogatories that may be served to twenty-five per side, including subparts.⁵⁴ Rule 31(a)(2)(A) limits each side in the litigation to the taking of ten depositions.⁵⁵ These limits are presumptive only and may be exceeded pursuant to court order.⁵⁶

III. IS DISCLOSURE THE ANSWER?

Commentators propose that a system of general disclosure would benefit counsel, the parties, and the court by requiring production of the same evidence discoverable under the previous rules without the expense and delay generated by the current practices used to obtain information.⁵⁷ Commentators also claim that judicial involvement would be more focused than under the present system of discovery.⁵⁸ It is argued that a motion for clarification would, for example, involve the judicial officer in a more meaningful way than that afforded by the current Rule 16 scheduling conference, which often takes place with the judicial officer knowing little or nothing about the facts of the case.⁵⁹

A. *The Utility of Disclosure in Cases Requiring Access to Traditional Discovery Methods*

The availability of, or necessity for, a motion to clarify as well as continuing access to traditional discovery, albeit by court order only, subjects the amended system of general disclosure to the same pitfalls associated with the current discovery process. Since discovery would almost always be necessary in complex litiga-

⁵³ See FED. R. CIV. P. 33(a) (effective Dec. 1, 1993) (limiting interrogatories); FED. R. CIV. P. 30(a)(2)(A) (effective Dec. 1, 1993) (limiting depositions). Some groups, citing the need for litigants of lesser means to rely upon written discovery rather than more costly depositions, resist placing limitations on the number of interrogatories that may be propounded. See, e.g., ADVISORY GROUP, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FINAL REPORT, 142 F.R.D. 185, 219 (1991) (noting opposition of earlier advisory committee to presumptive limits).

⁵⁴ See FED. R. CIV. P. 33(a) (effective Dec. 1, 1993).

⁵⁵ See FED. R. CIV. P. 31(a)(2)(A) (effective Dec. 1, 1993).

⁵⁶ See *id.* ("A party must obtain leave of court . . . [if] a proposed deposition would result in more than ten depositions being taken . . ."); FED. R. CIV. P. 33(a) (effective Dec. 1, 1993).

⁵⁷ See Schwarzer, *supra* note 23, at 182.

⁵⁸ Schwarzer, *supra* note 23, at 182 ("The disclosure system will involve the judge in the management of cases.").

⁵⁹ See Schwarzer, *supra* note 23, at 182.

tion,⁶⁰ the general disclosure system would do nothing more than add an extra layer of expense and delay. Similarly, models incorporating both disclosure and free access to traditional discovery do little to curtail the problems of over-discovery and the withholding of discoverable or "disclosable" information in all but the simplest of cases. Using the drug product liability lawsuit hypothesized above as a model, little difference can be observed among the systems.

As noted, the defendant manufacturer in such a case might, under the general disclosure system, make a motion to clarify in order to shield what the defense believes are irrelevant documents about differing formulations of the drug at issue. Under the limited disclosure system, a plaintiff faced with what is believed to be inadequate disclosure would make a motion to compel. Under the previous system, the defendant would object to a written request for production as irrelevant to the issues raised. Either the plaintiff would concede, or the court, as in the limited disclosure situation, would be faced with a motion to compel or a motion for a protective order.

In the latter two cases, the issues would be as focused, and the court as informed, as in the case of the proposed motion to clarify. Since the motion to clarify seems more akin to current motions to compel or for protection, it does not seem fair to point to the benefits of disclosure by comparing a motion to clarify to a Rule 16 conference.

In terms of judicial involvement, the only difference between the systems is a slight alteration in timing and the generation of papers in the form of a discovery request and responding objection. It is submitted that the making of, and objecting to, such a request is fairly routine and does not generate a great deal of expense and delay. Moreover, a written document request may, in some cases, be easier for a responding party to interpret than the vague language of rules requiring disclosure of all information that is "material" or "likely to bear significantly" on claims or defenses.⁶¹

⁶⁰ The term "complex" as used herein is not limited to those cases that may be litigated pursuant to the rules set forth in the Manual for Complex Litigation. See *MANUAL FOR COMPLEX LITIGATION*, SECOND § 33 (1985). Included in the definition are those cases in which the parties would participate or seek leave to participate in traditional discovery after complying with initial disclosure requirements.

⁶¹ See *supra* note 46 and accompanying text (comparing final Rule 26(a)(1)(B) with earlier version).

Nor can the disclosure system be justified on the notion that it necessarily fosters greater cooperation among counsel. While little research exists concerning the efficacy of mandatory disclosure rules, the results of one commentator's limited survey indicate that the rules work when attorneys are willing to cooperate.⁶² In cases where counsel are not anxious to comply, the rules are read technically, and information may be withheld.⁶³ Such compliance, like an overly technical reading of discovery requests, leads to the necessity for judicial involvement via motions to compel. Such compliance also defeats one of the purposes of the disclosure rules by forcing the parties to resort to traditional discovery methods.⁶⁴

Although it has been suggested that counsel interpreting disclosure requirements should view themselves as "officers of the court rather than partisan advocates,"⁶⁵ it is submitted that attorneys are not likely to interpret the terms of disclosure any more broadly or fairly to their adversary's interests than they would be to interpret a traditional document request.

Litigators know that the vast majority of cases settle prior to trial, and the pretrial disclosure of information can greatly impact the settlement value of a case.⁶⁶ Given this fact, attorneys will likely continue to act in their client's best interest and interpret rules as narrowly as possible within the bounds of the law. There is simply no reason to believe that attorneys will act as unbiased officers of the court—in effect judicial officers—during the pretrial phase of litigation and then suddenly revert to acting as partisan advocates during trial. Whatever the system, parties will not be more willing to produce potentially damaging documents and will refuse to do so in the absence of a court order—whether rendered in the context of a motion to clarify, to compel, or for protection.

If disclosure will not cause counsel to change current practices aimed at what counsel believe is a good faith effort to shield unfavorable evidence from discovery, it does not seem that there is any way around the notion that only "judges can save lawyers

⁶² See Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 817 (1991).

⁶³ *Id.* at 816-17.

⁶⁴ See *id.* at 822.

⁶⁵ Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1296, 1349-50 (1978) ("[C]ounsel should be commanded by new ethical directives and civil rules to search diligently for all data that might help resolve disputes fairly and to share voluntarily the results of their searches with both the court and the other parties to the action.").

⁶⁶ See Schwarzer, *supra* note 23, at 179.

from themselves.”⁶⁷ Put simply, there is no substitute for active judicial involvement, either from the district court judge handling the case or from the magistrate judge assigned to handle the pretrial phase of litigation. Lawyers cannot be expected to play the part of impartial arbiter when litigating in the pretrial phase.⁶⁸

The fact that district judges may be too busy to handle pretrial discovery matters or that magistrate judges do not have the prestige to ensure enforcement of their orders should not cause lawyers to abandon their roles as advocates. Certainly, district court judges are overburdened, especially by a growing criminal calendar.⁶⁹ If this is the case, however, judges must delegate responsibility to less burdened magistrate judges and make it clear to the parties that the district court stands behind the orders of the magistrate judge. In such a case, counsel would certainly adhere to the rulings of the magistrate judge, and pretrial discovery would proceed without the necessity of waiting for a ruling of an overburdened district court judge.

B. The Utility of Disclosure in Simple Cases

Proponents of disclosure argue that, in many cases, mandatory disclosure would comprise all of the discovery that is necessary to prepare a case for trial.⁷⁰ If this could be accomplished, then disclosure would be truly helpful in that the pretrial process would impose no burden on the courts and the parties would amicably go about their business of producing all necessary information prior to trial without conflict. As demonstrated above, however, it is unrealistic to think that parties will behave any differently under a system of disclosure than under the present system of discovery. This, however, is not reason enough to discard the disclosure notion completely.

In simple cases, the process of disclosure may well achieve the goals of cutting down on undue expense and delay. Specifically, a system of disclosure may institutionalize the cooperation that currently exists among many lawyers litigating simple cases. For ex-

⁶⁷ Schwarzer, *supra* note 23, at 179. Some advocates of change believe that judges should “exercise more effective supervision and control.” *Id.*

⁶⁸ Schwarzer, *supra* note 23, at 179-80.

⁶⁹ See, e.g., ADVISORY GROUP, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FINAL REPORT, 142 F.R.D. 185, 204 (1991) (discussing effects of criminal docket on civil justice system).

⁷⁰ See Schwarzer, *supra* note 23, at 182 (“If the disclosure system operates properly there should be few motions for discovery.”).

ample, a negligence case involving a nonpermanent, nonserious injury may be currently litigated by making a formal or informal request for medical records or authorization to obtain the same. After production of such records, the parties may agree to a fair settlement and the case will have been disposed of with no judicial intervention.

If this case were litigated under the disclosure system, the parties' actions and the outcome would be no different, except that the parties would be obligated to act as cooperative attorneys would in the normal course. By requiring early production by less than cooperative attorneys, the disclosure system may, indeed, foster a quicker and less expensive road to disposition of a simple case.

C. *The Utility of Limited Disclosure*

While limited disclosure does not seem to be the answer to all of the evils of the discovery process, there are reasons to consider implementation of such a rule.⁷¹ Limited disclosure can accomplish the elimination of a "first wave" of discovery requests.⁷² This eliminates the expense of drafting and objecting to such requests as well as the delay attendant thereto.

Limited disclosure can also eliminate squabbles over the discoverability of certain documents that are clearly within the scope of permissible discovery such as contracts or other documents used to prepare the pleadings.⁷³ As a first step in litigation, limited disclosure may result in the parties' early focus on the issues of the case and what discovery will be necessary to prepare the case for trial. In order to avoid the pitfalls referred to above, however, it is advisable to limit the subjects of early disclosure to clearly identifiable information. Such information might include insurance documentation, medical authorizations, materials used to calculate damages, and, in the case of corporate parties, the identification of individuals most knowledgeable about the issues in the case. The early production of such easily identifiable information is preferable to requiring the early production of all that is "material" or "likely to bear" on claims and defenses. As noted, the interpretation of these terms can result in satellite litigation

⁷¹ See *supra* note 70 and accompanying text.

⁷² See *supra* notes 33-35 and accompanying text.

⁷³ See *supra* note 34 and accompanying text.

and may result in more delay than is currently associated with the pretrial process.

CONCLUSION

If the concept of automatic disclosure, or any procedural reform, is to remedy abuses in the discovery process, it must address the abuses most commonly identified. As noted, the broadest use of the disclosure process would seem to create its own set of problems that are similar to those already faced by counsel and litigants. Limited disclosure can be effective in that it requires an early focus on issues. Further, if the subjects of disclosure are limited and clearly stated, limited disclosure can be an effective case management tool. In simple cases, disclosure may indeed accomplish the goal of replacing discovery and lead to an earlier and less expensive disposition of the case.

Replacing discovery with disclosure does not, however, address the perceived greater abuses of the discovery process. Disclosure, whether limited or general, is merely a first step in the discovery process. Thus, the problem of "over-discovery" persists.

Over-discovery tactics may be contained by placing limits on certain tools of discovery, such as limiting the number of interrogatories, document requests and the length and number of depositions. Arbitrary limitations, though embraced by the recent amendments to the Federal Rules,⁷⁴ are resisted by many who believe that abuses can be handled by a competent judiciary on a case-by-case basis. This opinion goes to the heart of the matter. Any program of discovery reform must include tight control by a judicial officer. When this ingredient is added to the mix, all aspects of discovery abuse are affected. With effective judicial control, compliance with deadlines can be monitored, speedy rulings as to the permissible scope of discovery may be obtained, and over-discovery will not be tolerated.

While automatic disclosure of basic information will certainly change and, in all probability, improve the discovery process, it is not a panacea. Reform programs should begin with disclosure and experiment with additional procedures such as limiting the use of discovery tools. Most importantly, however, an informed judicial

⁷⁴ See *supra* notes 53-56 and accompanying text (discussing fixed limits on number of interrogatories and depositions).

officer must preside over the process to ensure full disclosure of discoverable information without abuse.